

May 10, 1999

VIA ELECTRONIC &  
REGULAR MAIL

Bureau of Land Management  
Administrative Record  
Nevada State Office  
P.O. Box 12000  
Reno, Nevada

Re: Mining Claims Under the General Mining Laws; Surface Management

Dear Sir/Madam:

The Office of Advocacy of the U.S. Small Business Administration (SBA) was established by Congress under Pub. L. No. 94-305 to represent the views of small business before federal agencies and Congress. Advocacy is also required by §612 of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612) to monitor agency compliance with the RFA. On March 28, 1996, President Clinton signed the Small Business Regulatory Enforcement Fairness Act which made a number of significant changes to the Regulatory Flexibility Act, the most significant being provisions to allow judicial review of agencies' regulatory flexibility analyses.

**REGULATORY FLEXIBILITY ACT REQUIREMENTS**

The RFA requires administrative agencies to consider the effect of their actions on small entities, including small businesses, small non-profit enterprises, and small local governments. See 5 U.S.C. §§ 601, et. seq.; Northwest Mining Association v. Babbitt, 5 F. Supp. 2d 9. When an agency issues a rulemaking proposal, the RFA requires the agency to "prepare and make available for public comment an initial regulatory flexibility analysis" which will "describe the impact of the proposed rule on small entities." 5 U.S.C. § 603(a); *Id.*

**Initial Regulatory Flexibility Analysis**

If the proposed rule is expected to have a significant economic impact on a substantial number of small businesses, an initial regulatory flexibility analysis (IRFA) must be prepared and published with the proposed rule. The required IRFA is prepared in order

to ensure that the agency has considered all reasonable regulatory alternatives that would meet the agency's policy objectives but minimize the rule's economic impact on affected small entities. In accordance with Section 603(b) of the RFA, each IRFA must address the reasons that an agency is considering the action; the objectives and legal basis of the rule; the type and number of small entities to which the rule will apply; the projected reporting, record keeping, and other compliance requirements of the proposed rule; and all federal rules that may duplicate, overlap or conflict with the proposed rule.

Section 603(c) further provides that:

"Each initial regulatory flexibility analysis shall also contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities." (Emphasis added)

In terms of statutory construction, the word "shall" means shall. The courts have made it clear that when a statute uses the word "shall," Congress has imposed a mandatory duty upon the subject of the command. United States v. Monsanto, 491 U.S. 600, 607, 105 L. Ed. 2d 512, 109 S. Ct. 2657 (1989); Pierce v. Underwood, 487 U.S. 552, 569-70, 101 L. Ed. 2d 490, 108 S. Ct. 2541 (1988); Barrentine v. Arkansas-Best Freight Sys., Inc. 450 U.S. 728, 739 n.15, 67 L. Ed. 2d 641, 101 S. Ct. 1437 (1981); Forest Guardians v. Babbitt, No. 97-2370, 1998 U.S. App. LEXIS 37992, (10<sup>th</sup> Cir. 1998). Accordingly, the term "shall" in the RFA reflects Congress's intent to impose a mandatory duty on the agencies to consider and describe significant alternatives that will accomplish the stated objectives of the applicable statutes and minimize any significant economic impact of the proposed rule on small entities.

### **Certification**

Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an IRFA, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities. If the head of the agency makes such a certification, the agency shall publish such a certification in the Federal Register at the time of the publication of the general notice of proposed rulemaking along with a statement providing the factual basis for the certification. (Emphasis added)

### **BACKGROUND**

In 1991, the Bureau of Land Management (BLM) published a proposal to revise regulations implementing Section 302(b) of the Federal Land Policy and Management Act of 1976 ("FLPMA"). FLPMA directs the Secretary of Interior to prevent unnecessary or undue degradation of public lands from activities conducted pursuant to the Mining Law of 1872.

BLM's original regulations, implementing section 302(b) of FLPMA, went into effect on January 1, 1981. The rule, 43 C.F.R. § 3809.1-3, required mining claimants to complete reclamation during and upon termination of exploration and mining activities under the mining laws on federal lands administered by BLM. The rule classified mining operations in terms of casual use, notice operations, or plan of operations. The bonding requirements for plans of operation were at BLM's discretion. 43 C.F.R. § 3809.0-5 Bonds were not required for casual use or notice operations unless there was a pattern of violation.

The rule that BLM proposed in 1991 explained that bonding or other financial or surety arrangements would be useful to protect against unnecessary and undue degradation of land. The proposal required submission of financial guarantees for reclamation for all operations greater than casual use; created additional financial instruments to satisfy the requirement for a financial guarantee; and amended the noncompliance section of the

regulations to require the filing of plans of operations by operators who establish a record of noncompliance. It also required "notice operators" to certify the existence of a financial guarantee in the amount of \$5,000. Operators proceeding under a "plan of operations" were required to provide a financial guarantee sufficient to cover the performance of the reclamation. The financial guarantee was capped at \$1,000 per acre for exploration activities and \$2,000 for mining activities.

In terms of the RFA, the BLM did not perform an initial regulatory flexibility analysis of the proposed rulemaking. Instead, the agency stated, without any explanation, that "under the Regulatory Flexibility Act (5 USC § 601 et seq. ) that the proposed rule will not have a significant economic impact on a substantial number of small entities." The "certification" was devoid of an explanation for the basis of the certification as required by 5 U.S.C. § 605(b) of the RFA in 1991 (at that time, pre-SBREFA, a "succinct" statement was required).

Six years elapsed before BLM published the final rule in the Federal Register on February 28, 1997. In the final rule, BLM changed the bonding requirement for "notice operations". Instead of requiring notice operations to provide a financial guarantee in the amount of \$5,000 (essentially, a ceiling) as proposed in 1991, BLM unilaterally decided, under the final rule, to require notice level operators to provide a bond sufficient to cover 100 percent of the estimated costs of reclamation with a minimum rate of \$1,000 per acre (essentially, a floor). In addition, BLM amended the rule to include another significant requirement not discussed in the proposed rule that only professional engineers provide the certification of operators' calculation of the cost of reclamation.

In terms of the RFA, BLM certified that the final rule would not have a significant economic impact on a substantial number of small entities. The statement and supporting "analysis" were based on a definition of "small miner" that differed from the definition in SBA's regulations. BLM did not consult with the Office of Advocacy or SBA, prior to selecting an alternative size standard, as required by the RFA.

Shortly after the rule was finalized, the mining industry challenged BLM's actions. In May 1998, the United States District Court for the District of Columbia found that BLM had violated the requirements of the RFA by using an alternative size standard without consulting with SBA and the Office of Advocacy. The court remanded the rule to the agency for procedures consistent with the opinion. *See Northwest Mining v. Babbitt*, 5 F. Supp.2d 9, (D.D.C., 1998).

## **BLM'S CURRENT PROPOSAL**

On February 9, 1999, BLM published a proposed rule in the *Federal Register*, Vol. 64, No. 26, p. 6422 on Mining Claims Under the General Mining Laws; Surface Management. This proposal was in response to the court's directive to perform procedures consistent with the court's opinion. While the Office of Advocacy acknowledges that BLM has made some improvements in its quest to comply with the RFA, Advocacy is disturbed by BLM's failure to abide by many of the major components of RFA compliance.

### ***Size Standards***

As stated previously, the court remanded this matter to the agency because BLM did not consult with the Office of Advocacy or SBA prior to using an alternate size standard. That particular aspect of compliance is no longer an issue. The Office of Advocacy is pleased by the fact that BLM consulted with Advocacy and SBA about the size standard issue prior to reproposing the rule. Indeed, the agency performed two analyses, one with the SBA size standard and another using a subcategory, to determine the economic impact of the proposal on the industry. The Office of Advocacy, therefore, is not concerned about whether BLM has complied with the size standard requirements. The number of deficiencies in the economic analysis, however, disturbs the Office of Advocacy.

### ***BLM's RFA Classification***

In the proposed rule, the Bureau of Land Management (BLM) concludes that:

"While the proposed rule affects a significant number of small entities, the impacts cannot be classified as significant. Therefore, BLM has determined under the RFA that this proposed rule would not have a significant economic impact on a substantial number of small entities. For additional information, see the Regulatory Flexibility Analysis on file in the BLM Administrative Record..."

Id., at 6449. The Office of Advocacy read the RFA statement and the RFA analysis that was provided by BLM. After reading the RFA statement and reviewing the "economic analysis", Advocacy is unable to ascertain whether BLM is certifying the rulemaking or submitting an Initial Regulatory Flexibility Analysis (IRFA). In any event, the Office of Advocacy disagrees with BLM's determination of no significant economic impact on a substantial number of small entities. Advocacy further asserts that given the magnitude of the impact, certification is improper and the information provided is insufficient for meeting the requirements of an IRFA.

### ***BLM's Criteria for Determining Significant Economic Impact Indicates that the Agency Should Have Performed An IRFA***

As quoted in the preceding, BLM concluded that the proposal will affect a substantial number of small entities. The only issue, then, is the magnitude of that anticipated effect on this substantial number.

Although BLM concludes that the proposed rule will not have a "significant economic impact", this conclusion is not supported by the data in BLM's economic analysis. BLM states its criteria for determining "significant economic impact" on page 79 of the "IRFA". It states that:

"The definition of 'significant economic impact' used in this analysis is an impact that causes a 3% or more impact on estimated annual operating costs or on the ratio of the net present value of compliance costs to gross sales."

Using BLM's criteria, it is fairly clear from its own analysis that the proposal will have a

significant economic impact on a substantial number of small entities.

BLM makes several different statements, throughout the proposal, about the economic impacts that would support a finding of "significant economic impact." BLM discusses the impact on placer, open pit, strip mine, and exploration models. The various representations about impact include statements that:

"...the impact on a small placer firm would be at the low end of 'average' range, the 'average' impact represents about 9% of the estimated net present value of gross revenues." "IRFA" at p. 95.

"... for the modeled strip operation, the net present value of costs is about 4% of the estimated net present value of gross revenues." "IRFA" at p. 96.

"...considered on a present value basis, the estimated percent cost increases were 2.9%, 5.6%, 7.9%, and 38% respectively for the placer, the open pit, the strip mine, and the exploration models." "IRFA" at p. 100.

"... the estimated percent cost increases were 2.0%, 8.9%, and 6.7% for the modeled placer, open pit, and strip mining operations, respectively." Id.

"...increasing the proportion of waste rock backfilled...from 25% to 50% increased the present value of costs [for the open pit model] from 5.6% to 15.6%..." Id.

"... increases in bonding costs required by the proposed rule will cause costs to increase by 4.9%, 11.9%, and 13.8% for placer, open pit, and strip respectively." Id.

"Exploration activities were estimated to face annual cost increases ranging from 0-38%." "IRFA" at p.101.

"If it were assumed that the distribution of potential exploration cost increases was 0%, 20%, 30%, and 40%, and that the distribution of potentially impacted firms was 5%, 20%, 50%, 20%, and 5%, this implies that the average cost increase is on the order of 11%..." "IRFA" at pp.101-102.

"The estimated average annual percentage cost changes associated with the modeled open pit and strip operations were 7-9%..." "IRFA" at p.103.

"On a net present value basis, the estimated percent cost increases were 2.9%, 5.6%, and 7.8%, respectively, for the placer model, the open pit model, and the strip model." Id.

"On an average annual basis, the estimated percent cost increases were 2.0%, 8.9%, and 6.7% for the modeled placer, open pit, and strip operations." Id.

Needless to say, the 9%, 4%, 4.9%, 5.6%, 7.9%, 11.9%, 13.8% and 38% all exceed the BLM threshold of 3%. Individually and in the aggregate, the impacts on the various segments of the industry indicate a significant economic impact. BLM's finding, therefore, of "no significant

economic impact" is beyond comprehension.

In addition, the Office of Advocacy's Office of Economic Research also reviewed the economic data provided BLM. After analyzing the data provided, it concluded that the proposal will have a significant economic impact on a substantial number of small entities. Specifically, David W. Schnare, Ph.D found that:

"...Contrary to the BLM conclusion, the rule does impose significant costs and does so on the vast majority of small entities. Analysis of IRS data demonstrates that the regulated industries operate at the edge of profitability and that the rule would oust small business from this industry.

### Background

BLM has certified that the proposed rule "would not have a significant economic impact on a substantial number of small entities." *See* 64 FR 261, 6421 (Feb. 9, 1999); [http://www-a.blm.gov/nhp/news/regul/3800/43\\_3809t.html](http://www-a.blm.gov/nhp/news/regul/3800/43_3809t.html)> at page 69 of 124. Under the Regulatory Flexibility Act (RFA) (5 U.S.C. §605(b)), BLM is required to provide "the factual basis for such certification." The proposed rule would regulate only those mineral mining operations on federal lands and would not cover oil, gas or coal mining. The major feature of the proposal would require regulated establishments to provide a financial guarantee (*e.g.* surety bond) sufficient to fully pay for restoration of federal lands upon completion of mining. In the main, the regulated industry is the metal and industrial minerals mining industry (NAICS 2122, 2123; SIC 10 & 14). When drawing on Department of the Treasury, IRS data, the regulated industries fall into Major Groups 02 & 05, consisting of minor industry groups 1070, 1098 and 1430,1498, respectively.

### **Significance of Economic Impacts Selection of Evaluation Criteria**

BLM states that if more than 20% of affected entities suffer an increase of 3% or more in operating costs (or more than 3% of gross sales), it would find the proposed rule to impose a significant impact on a substantial number of small entities. BLM, Initial Small Business and Regulatory Flexibility Act Analysis at 79 (1998). The agency offers no economic or financial basis for either the cost or the revenue-based criterion, nor can they without related them to the profitability of the industry. Rather, the BLM suggests that it applies these criteria because two other agencies use similar criteria. In fact, NOAA has withdrawn its cost-based criterion because it had no cogent rationale on which to ground the measure. As well, EPA has retreated from a revenue-based approach whenever possible, looking instead to profit-based measures. In the absence of an independent basis for selecting its criteria, BLM has no rational basis for its measure.

### **The Rule Imposes a Significant Impact on a Substantial Number of Small Entities, even when Applying the BLM Criterion**

In its economic analysis, BLM states that placer, open pit and strip mines will suffer average regulatory cost increases of 2.9%, 9% and 8%, respectively. *See, id.* at 46. Under normal distributions, these average cost increases would affect well in excess of 20% of the regulated population. BLM estimates the dollar amounts of these average annual impacts at between

\$56,667 and \$85,000. These cost increases clearly exceed the "3% cost increase for 20% of small entities" criterion it selected for use.

### **The Proposed Rule would Erase Profitability for Most Small Hard Rock Miners**

The \$56,667 (minimum) average annual regulatory cost to small mining entities constitutes a massive assault on profitability within the industry. As Table 1 indicates, the vast majority of miners operate at the very edge of profitability. At best, small entities report small profits. The vast majority report losses. Even taking the whole industry, \$56,667 constitutes 31% of profit in the best year for the most profitable part of the industry.

Table 1

	1991	1992	1993
<b>Metal Mining</b>			
Percent of Returns from Small Entities (Small = <\$5M Assets)	89%	92%	>54%
Percent Reporting a Loss	88%	91%	88%
Percent of Small Entities Reporting a Loss (Small = < \$5M Assets)	89%	93%	92%
Average Profits (\$1,000s)	\$183	\$129	\$162
Average Profit or Loss of Small Entities (\$1,000s) (Small = <\$5M Assets)	\$23	-\$1	-\$52

Also drawn from IRS data, additional tables (attached), provide information by eight size categories and for four subcategories within the regulated universe. These tables exceeds the average profit even amongst those who report profits, with the exception of medium-sized and large gold miners.(1)

### **Conclusion**

The Proposed DOI Rulemaking Subpart 3809 "Surface Management Rule" imposes a significant impact on a substantial number of small entities. The regulatory costs would impose impacts so large as to suggest BLM plans to remove small hard rock miners from the market place, as only very large operations could shoulder the costs and remain profitable." (2)

In that the economic information indicates a significant economic impact on a substantial number of small entities, certification of the proposal is improper. Accordingly, BLM must perform an [IRFA](#) in order to comply with the requirements of the RFA.

### ***BLM's Economic Analysis Does Not Comply with the Requirements of an IRFA***

Even as an IRFA, the economic analysis provided by BLM does not comply with the requirements of the RFA. The RFA requires an agency to provide forthright information about the potential economic impact of a proposed rulemaking and to consider alternatives to that rulemaking.

From an economic standpoint, Dr. Schnare found that the proposed rule would erase profitability for most of the small hard rock miners. BLM, however, steadfastly maintains that the impact will not be significant, even though their own data indicates otherwise. BLM's failure to admit to the potential impact of the proposal compromises the integrity of its analysis. If an agency refuses to recognize the adverse impacts of its actions, the agency cannot inform the public about the potential adverse effects of the proposal as required by the RFA.

In addition to failing to provide an economic analysis that meets the criteria for an adequate IRFA, BLM also failed to consider and make available for public comment realistic alternatives to the action.

### ***BLM Has Failed to Analyze the Alternatives As Required By the RFA***

As stated previously, the Congressional intent is clear- agencies **must** consider alternatives to regulatory proposals, in addition to the economic data, when preparing an IRFA. The absence of alternatives renders an IRFA inadequate.

BLM does not provide viable alternatives in its analysis. In fact, BLM's analysis contains no viable alternatives to the action. Instead, BLM provides "options" for mitigating the effects on small businesses. These "options" include choices such as 1) shifting their operations to non-federal lands; 2) adopting different techniques; 3) shortening the life of the mine; or 4) temporarily halting mining until commodity prices increase. ("IRFA" p. 104 of analysis)

Aside from the fact that BLM did not consider the economic impact of the options, these "options" are not alternatives to the agency action. These are mere suggestions as to what BLM thinks that a member of the industry should do if the new requirements are too burdensome, not alternative regulatory actions to BLM's proposal.

Moreover, with the exception of adopting different changing techniques, the "options" provided are not really realistic options for a small business to undertake in order to mitigate economic impact. As for adopting different techniques, BLM neither provides nor analyzes suggested changes. The other "options" are tantamount to saying "if you don't want to abide by the new bonding requirement, then get off the federal land or go out of business."

Aside from such "options" being incredibly callous and insensitive suggestions, they in no way indicate an understanding that the purpose of the RFA is to enhance agency sensitivity to the economic impact of rulemaking on small businesses and to ensure that alternative proposals receive serious consideration at the agency level. If anything, they indicate insensitivity to the



economic impact on small businesses and a cavalier attitude towards the requirement that agencies consider alternatives.

In the remand submission for Southern Offshore Fisheries v. Daley(3), the National Marine Fisheries Services (NMFS) considered alternatives such as "closure of the LCS fishery" and "maintaining the status quo. In reviewing NMFS's submission the United States District Court for the Middle District of Florida stated that NMFS had afforded minimal treatment to more realistic and constructive alternatives.(4) The court found the agency's "seemingly cosmetic and cursory consideration of alternatives" to be "disconcerting".(5) The court ruled that NMFS inadequately considered, and perhaps overlooked altogether, feasible alternatives or adjustments to the 1997 quotas that may mitigate the quotas' pecuniary injury to the directed shark fishermen and appointed a special master(6) to review the matter for workable alternatives. (7)

The Office of Advocacy asserts that BLM's failure to consider alternatives is far more egregious than the failures of NMFS. At least NMFS provided a superficial consideration of alternative agency actions. BLM's consideration of alternatives for the agency to consider is totally nonexistent. If NMFS's superficial treatment of alternatives did not withstand judicial scrutiny, BLM's nonexistent treatment of alternatives surely will not.

## CONCLUSION

The "economic analysis" provided by BLM does not satisfy the court's remand order in Northwest Mining v. Babbitt. While the court's directive to perform procedures consistent with the court's opinion is admittedly vague, BLM's proposed analysis would only comply with the court's directive through an extremely narrow interpretation of the court's order. The narrow interpretation would be that the court merely meant for BLM to consult with the Office of Advocacy about the proper size standard prior to performing an economic analysis and issuing a proposed rule. In essence, for BLM to believe that its economic analysis complies with the court's order, BLM must believe that the court only intended for BLM to comply with the size standard portion of the RFA before proposing the remanded rule. Such an interpretation is not only irrational, it is also illogical and nonsensical.

A rational and good faith interpretation of the court's ruling would be that the court remanded the matter to the agency for BLM to submit an analysis that complied with the requirements of the RFA. The RFA compels an agency to make a reasonable and good faith effort, prior to the issuance of a final rule, to inform the public about potential adverse effects of his proposals and about less harmful alternatives. Associated Fisheries of Maine v. Daley, 127 F.3d 104,114-115 (1st Cir., 1997); Southern Offshore Fishing Association v. Daley, 995 F. Supp. 1411, 1436 (M.D. Fl., 1998). BLM has not met that burden. Because the deficiencies in the analysis are so extreme, the Office of Advocacy submits that BLM must republish the rule with an IRFA that complies with the requirements of the RFA. Failure to do so not only disregards the requirements of RFA and court's order, it also disregards the tenets of fair and rational rulemaking.

If you have any questions, please feel to contact Jennifer A. Smith, Assistant Chief Counsel for Economic Regulation at 202-205-6943. Thank you for allowing me to comment on this important proposal.

Sincerely,

Jere W. Glover  
Chief Counsel  
Office of Advocacy

Jennifer A. Smith  
Assistant Chief Counsel  
for Economic Regulation &  
International Trade

ATTACHMENT #1

May 10, 1999

Re: DOI Subpart 3809 – Surface Mining Certification

The Office of Interagency Affairs has asked for a technical review of the "Initial Small Business and Regulatory Flexibility Act Analysis" for the Department of Interior (DOI) (Bureau of Land Management (BLM)) Proposed Subpart 3809 Surface Management rule(8), and in particular for a review on the conclusion that the proposed rule would not impose a significant economic impact on a substantial number of small entities. Contrary to the BLM conclusion, the rule does impose significant costs and does so on the vast majority of small entities. Analysis of IRS data demonstrates that the regulated industries operate at the edge of profitability and that the rule would oust small business from this industry.

### Background

BLM has certified that the proposed rule "would not have a significant economic impact on a substantial number of small entities." *See* 64 FR 261, 6421 (Feb. 9, 1999); [http://www-a.blm.gov/nhp/news/regul/3800/43\\_3809t.html](http://www-a.blm.gov/nhp/news/regul/3800/43_3809t.html) at page 69 of 124. Under the Regulatory Flexibility Act (RFA) (5 U.S.C. §605(b)), BLM is required to provide "the factual basis for such certification." The proposed rule would regulate only those mineral mining operations on federal lands and would not cover oil, gas or coal mining. The major feature of the proposal would require regulated establishments to provide a financial guarantee (*e.g.* surety bond) sufficient to fully pay for restoration of federal lands upon completion of mining. In the main, the regulated industry is the metal and industrial minerals mining industry (NAICS 2122, 2123; SIC 10 & 14). When drawing on Department of the Treasury, IRS data, the regulated industries fall into Major Groups 02 & 05, consisting of minor industry groups 1070, 1098 and 1430, 1498, respectively.

### **Significance of Economic Impacts** **Selection of Evaluation Criteria**

BLM states that if more than 20% of affected entities suffer an increase of 3% or more in operating costs (or more than 3% of gross sales), it would find the proposed rule to impose a significant impact on a substantial number of small entities. BLM, Initial Small Business and Regulatory Flexibility Act Analysis at 79 (1998). The agency offers no economic or financial basis for either the cost or the revenue-based criterion, nor can they without related them to the profitability of the industry. Rather, the BLM suggests that it applies these criteria because two other agencies use similar criteria. In fact, NOAA has withdrawn its cost-based criterion because it had no cogent rationale on which to ground the measure. As well, EPA has retreated from a

revenue-based approach whenever possible, looking instead to profit-based measures. In the absence of an independent basis for selecting its criteria, BLM has no rational basis for its measure.

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Table 1, Cont.

<b>Non-Metallic Minerals</b>	1991	1992	1993
Percent of Returns from Small Entities (Small = <\$5M Assets)	94%	92%	84%
Percent Reporting a Loss	71%	58%	60%
Percent of Small Entities Reporting a Loss (Small = < \$5M Assets)	74%	61%	67%
Average Profits (\$1,000s)	\$71	\$118	\$44
Average Profit or Loss of Small Entities (\$1,000s) (Small = <\$5M Assets)	\$16	\$12	\$2

Source: IRS, Statistics of Income, Publication 1053 (1991-1993).

Also drawn from IRS data, additional tables (attached), provide information by eight size categories and for four subcategories within the regulated universe. These tables show that a \$56,667 annual cost exceeds the average profit even amongst those who report profits, with the exception of medium-sized and large gold miners<sup>(9)</sup>

## Conclusion

The Proposed DOI Rulemaking Subpart 3809 "Surface Management Rule" imposes a significant impact on a substantial number of small entities. The regulatory costs would impose impacts so large as to suggest BLM plans to remove small hard rock miners from the market place, as only very large operations could shoulder the costs and remain profitable.

David W. Schnare, Ph.D.

				July 1991 - June 1992					
Industry				Asset Class (\$1,000)					
	Total	\$1- 99	\$100- 249	\$250- 499	\$500- 999	\$1,000- 4,999	\$5,000- 9,999	\$10,000- 24,999	\$25,000 and over
<b>Metal Mining</b>									
Number of Returns	1,365	322	408	183	186	116	31	30	

Percent Reporting Net Income (profit)	12%	0%	0%	50%	0%	41%	13%	33%	***
Average Net Income <b>All Returns</b> (\$1,000s)	\$183	-\$3	-\$42	\$3	-\$92	\$58	-\$1,841	-\$656	\$5,300
Average Net Income <b>Profitable Returns</b> (\$1,000s)	\$4,608	None	None	\$6	None	\$891	\$137	\$317	***
<b>0</b>									
<b>Copper, Lead, Zinc, Gold and Silver Ores</b>									
Number of Returns	836	322	***	183	131	69	22	16	1
Percent Reporting Net Income (profit)	18%	None	None	50%	None	42%	18%	63%	***
Average Net Income <b>All Returns</b> (\$1,000s)	\$44	-\$3	***	\$3	-\$138	\$302	-\$2,445	-\$685	\$2,500
Average Net Income <b>Profitable Returns</b> (\$1,000s)	\$3,539	None	None	\$6	None	\$1,411	\$137	\$317	***
<b>8</b>									
<b>Other Metal Mining</b>									
Number of Returns	530	None	***	None	54	47	9	15	1
Percent Reporting Net Income (profit)	5%	None	None	None	None	40%	None	None	***
Average Net Income <b>All Returns</b> (\$1,000s)	\$401	None	***	None	-\$0.3	-\$301	-\$366	-\$579	\$13,300
Average Net Income <b>Profitable Returns</b> (\$1,000s)	\$10,414	None	None	None	None	\$97	None	None	***
<b>Non-metallic Minerals Except Fuels</b>									

Number of Returns	4612	2157	475	660	443	589	116	95	
Percent Reporting Net Income (profit)	29%	None	21%	62%	47%	71%	68%	63%	74
Average Net Income <b>All Returns</b> (\$1,000s)	\$71	-\$2	\$17	\$14	-\$21	\$110	\$168	\$388	\$2,8
Average Net Income <b>Profitable Returns</b> (\$1,000s)	\$428	None	\$109	\$36	\$24	\$286	\$450	\$1,358	\$5,7
<b>0</b>									
<b>Dimension, Crushed, and Broken Stone; Sand and Gravel</b>									
Number of Returns	4019	***	441	578	395	549	94	70	
Percent Reporting Net Income (profit)	30%	None	19%	71%	41%	73%	76%	70%	***
Average Net Income <b>All Returns</b> (\$1,000s)	\$62	***	-\$5	\$24	-\$28	\$151	\$265	\$372	\$1,1
Average Net Income <b>Profitable Returns</b> (\$1,000s)	\$354	None	\$8	\$36	\$19	\$282	\$497	\$1,075	***
<b>8</b>									
<b>Other Non-Metallic Minerals</b>									
Number of Returns	593	***	34	82	47	40	23	25	
Percent Reporting Net Income (profit)	20%	None	59%	None	100%	35%	35%	48%	***
Average Net Income <b>All Returns</b> (\$1,000s)	\$133	***	\$297	-\$52	\$41	-\$460	-\$237	\$431	\$4,7
Average Net Income <b>Profitable Returns</b> (\$1,000s)	\$1,200	None	\$527	None	\$41	\$422	\$38	\$2,404	***
<b>Industry</b>				<b>July 1992 - June 1993</b>					

				Asset Class (\$1,000)					
	Total	\$1- 99	\$100- 249	\$250- 499	\$500- 999	\$1,000- 4,999	\$5,000- 9,999	\$10,000- 24,999	\$25,000 and over
<b>Metal Mining</b>									
Number of Returns	2088	1133	198	320	173	91	44	30	1
Percent Reporting Net Income (profit)	9%	None	None	None	43%	57%	7%	60%	45%
Average Net Income <b>All Returns</b> (\$1,000s)	\$129	-\$12	-\$12	-\$29	\$97	\$68	-\$512	-\$267	\$5,186
Average Net Income <b>Profitable Returns</b> (\$1,000s)	\$4,515	-	-	-	\$232	\$359	\$150	\$1,737	\$28,100
<b>0</b>									
<b>Copper, Lead, Zinc, Gold and Silver Ores</b>									
Number of Returns	1274	696	None	320	70	71	24	18	1
Percent Reporting Net Income (profit)	7%	None	-	None	***	44%	None	56%	42%
Average Net Income <b>All Returns</b> (\$1,000s)	\$152	-\$20	-	-\$29	\$157	\$82	-\$607	-\$171	\$5,000
Average Net Income <b>Profitable Returns</b> (\$1,000s)	\$7,815	-	-	-	***	\$589	-	\$2,721	\$33,600
<b>8</b>									
<b>Other Metal Mining</b>									
Number of Returns	814	437	198	None	103	21	19	12	1
Percent Reporting Net Income (profit)	12%	None	None	None	***	100%	16%	67%	53%
Average Net Income <b>All Returns</b> (\$1,000s)	\$92	-\$1	-\$12	-	\$57	\$19	-\$419	-\$412	\$5,743

Average Net Income <b>Profitable Returns</b> (\$1,000s)	\$1,438	-	-	-	***	\$19	\$150	\$506	\$15,000
<b>Non-metallic Minerals Except Fuels</b>									
Number of Returns	4068	1435	763	605	380	558	152	87	1
Percent Reporting Net Income (profit)	42%	None	74%	54%	46%	70%	72%	55%	62%
Average Net Income <b>All Returns</b> (\$1,000s)	\$118	-\$10	\$27	\$9	-\$11	\$41	\$531	\$230	\$4,600
Average Net Income <b>Profitable Returns</b> (\$1,000s)	\$404	-	\$37	\$19	\$56	\$228	\$785	\$1,154	\$5,500
<b>0</b>									
<b>Dimension, Crushed, and Broken Stone; Sand and Gravel</b>									
Number of Returns	3941	1435	763	605	380	497	135	65	1
Percent Reporting Net Income (profit)	42%	None	74%	54%	46%	76%	74%	65%	***
Average Net Income <b>All Returns</b> (\$1,000s)	\$88	-\$10	\$27	\$9	-\$11	\$178	\$1,281	\$368	\$3,939
Average Net Income <b>Profitable Returns</b> (\$1,000s)	\$314	-	\$37	\$19	\$56	\$217	\$785	\$1,035	***
<b>8</b>									
<b>Other Non-Metallic Minerals</b>									
Number of Returns	127	None	None	None	None	61	17	22	
Percent Reporting Net Income (profit)	52%	-	-	-	-	59%	None	27%	84
Average Net Income <b>All Returns</b> (\$1,000s)	\$1,059	-	-	-	-	-\$16	-\$151	-\$178	\$6,525



Average Net Income <b>Profitable Returns</b> (\$1,000s)	\$2,652	-	-	-	-	\$339	-	\$1,984	\$8,300
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Industry				July 1993 - June 1994					
				Asset Class (\$1,000)					
	Total	\$1- 99	\$100- 249	\$250- 499	\$500- 999	\$1,000- 4,999	\$5,000- 9,999	\$10,000- 24,999	\$25,000 and over
<b>Metal Mining</b>									
Number of Returns	1546	***	368	200	156	108	37	35	1
Percent Reporting Net Income (profit)	12%	None	None	None	63%	26%	None	51%	***
Average Net Income <b>All Returns</b> (\$1,000s)	\$162	***	-\$5	-\$54	-\$42	-\$503	-\$1,051	-\$438	\$6,521
Average Net Income <b>Profitable Returns</b> (\$1,000s)	\$4,664	-	-	-	\$55	\$616	-	\$2,282	***
<b>0</b>									
<b>Copper, Lead, Zinc, Gold and Silver Ores</b>									
Number of Returns	905	344	187	133	58	66	15	24	1
Percent Reporting Net Income (profit)	6%	None	None	None	None	5%	None	42%	43
Average Net Income <b>All Returns</b> (\$1,000s)	\$231	-\$52	-\$1	-\$4	-\$207	-\$720	-\$1,671	-\$154	\$6,629
Average Net Income <b>Profitable Returns</b> (\$1,000s)	\$13,170	-	-	-	-	\$3,236	-	\$950	\$37,600
<b>8</b>									
<b>Other Metal Mining</b>									



<b>8</b>									
<b>Other Non-Metallic Minerals</b>									
Number of Returns	311	None	None	None	None	53	10	16	
Percent Reporting Net Income (profit)	15%	-	-	-	-	30%	100%	38%	94
Average Net Income <b>All Returns</b> (\$1,000s)	-\$58	-	-	-	-	-\$27	\$229	-\$725	-\$84
Average Net Income <b>Profitable Returns</b> (\$1,000s)	\$3,208	-	-	-	-	\$848	\$229	\$731	\$8,7

## ENDNOTES

1. Notably, gold mines reflect economic outliers from the rest of the mining community. An examination of data for the rest of the regulated industry suggests that BLM's reliance on gold mines as the basis for economic modeling may significantly mask the economic consequences of its actions. Although the proposed rules would have very large impacts on small gold mines, the economics of these mines, and the large environmental consequences of these mine, as compared to others, suggests BLM should have considered different restrictions for gold mines than for other mines.

2. See Attachment 1.

3. Southern Offshore Fishing Association v. Daley, Case No. 97-1134-CIV-T, United States District Court, Middle District of Florida, Tampa Division, October 16, 1998. (Attached as Attachment #2).

4. Slip Op. at 5.

5. Slip Op. at 6.

6. The court also ordered NMFS to absorb the costs incurred in the employment of the special master at an hourly rate of \$275. Slip Op. at 8.

7. Slip Op. at 7.

8. BLM includes all regulatory impact analysis in a document entitled "Benefit-Cost Analysis/Unfunded Mandates Reform Act Analysis and Initial Small Business and Regulatory Flexibility Act Analysis" (December 22, 1998).

9. Notably, gold mines reflect economic outliers from the rest of the mining community. An examination of data for the rest of the regulated industry suggests that BLM's reliance on gold mines as the basis for economic modeling may significantly mask the economic consequences of its actions. Although the proposed rules would have very large impacts on small gold mines, the economics of these mines, and the large environmental consequences of these mine, as compared to others, suggests BLM should have considered different restrictions for gold mines than for

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